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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of	:	Customer Number: 46320
	:	
Radhika AGGARWAL, et al.	:	Confirmation Number: 2419
	:	
Application No.: 10/041,141	:	Group Art Unit: 2178
	:	
Filed: January 3, 2002	:	Examiner: T. Huynh
	:	
For: INLINE ERROR HIGHLIGHTING	:	

**APPEAL BRIEF**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed January 14, 2009, and response to the Examiner reopening prosecution in the Office Action dated April 29, 2009, wherein Appellants appeal from the Examiner's rejection of claims 1-5.

**I. REAL PARTY IN INTEREST**

This application is assigned to IBM Corporation by assignment recorded on January 3, 2002, at Reel 012482, Frame 0318.

**II. RELATED APPEALS AND INTERFERENCES**

On August 29, 2007, a Decision on Appeal was rendered in the present Application. Appellants are unaware of any other related appeals and interferences.

### **III. STATUS OF CLAIMS**

Claims 1-5 and 11 are pending in this Application. Claims 1-5 have been rejected eight times, and claims 6-10 have been cancelled. It is from the multiple rejections of claims 1-5 that this Appeal is taken. Claim 11 was newly added in the Amendment dated July 28, 2008. Although the Examiner rejected claim 11 in the Seventh Office Action dated October 14, 2008, the Examiner withdrew this rejection in the Eighth and Final Office Action. As such, Appellants proceed under the basis that claim 11 is allowable over the applied prior art.

### **IV. STATUS OF AMENDMENTS**

The claims have not been amended subsequent to the imposition of the Eighth Office Action.

### **V. SUMMARY OF CLAIMED SUBJECT MATTER**

Independent claim 1 is directed to an inline error notification method. Referring to Figure 3 and pages 10-12 of Appellants' specification, a validation error is detected in block 310 based upon a value provided through an input-element in a markup specified form (page 10, line 20 through page 11, line 6). In block 314, a suitable textual error message is selected based upon the type of validation error which has occurred (page 11, lines 16-19). In block 316, markup specifying the row is inserted into the markup specifying the form at a position which is proximate to the input-element which gave rise to the validation error (page 11, lines 19-24). Also in block 316, the textual error message selected in block 314 is inserted into a row (page 12, lines 1-2). To visually distinguish the inline error notification from the rest of the form, the background of the row assumes a color which differs from the colors of the input element and its

- 1 surroundings (page 12, lines 2-4). In step 318, an anchor tag is applied proximately to the input-
- 2 element (page 12, lines 6-8). In consequence, when the page containing the form is reloaded, the
- 3 anchor is specified in the URL causing the page to scroll to a position which is proximate to the
- 4 input-element (page 12, lines 8-10).

#### **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

1. Claims 1-2 and 5 were rejected under 35 U.S.C. § 103 for obviousness based upon Upton et al., U.S. Patent Publication No. 2003/0104884 (hereinafter Upton), in view of Jeffries et al., U.S. Patent No. 6,094,529 (hereinafter Jeffries), and Homer et al., "Instant HTML," copyright 1997, pages 88-101 (hereinafter Homer); and

2. Claims 3-4 were rejected under 35 U.S.C. § 103 for obviousness based upon Upton in view of Jeffries and Homer and further in view of Hartmann, U.S. Patent No. 6,615,226.

**VII. ARGUMENT**

**THE REJECTION OF CLAIMS 1-2 AND 5 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS  
BASED UPON UPTON IN VIEW OF JEFFRIES AND HOMER**

For convenience of the Honorable Board in addressing the rejections, claims 2 and 5 stand or fall together with independent claim 1.

**Actual Reduction to Practice**

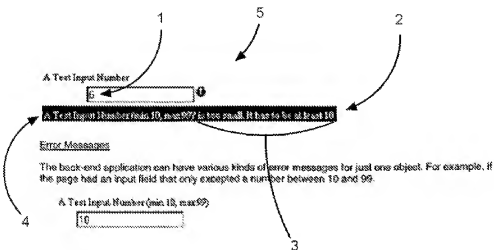
In the Declaration dated December 13-15, 2004 (hereinafter the First Declaration), Appellants declared the following in the fourth enumerated paragraph on page two:

At the time of submitting the Disclosure an experimental prototype of the Invention had been created and work had begun in producing a production version of the Invention.

In response, the Examiner asserted the following on page 7 of the Third Office Action dated September 2, 2005:

This is not persuasive. The Declaration filed on 12/21/2004 fails to provide evidence(s) to show that the prototype was actually reduced to practice. The Declaration provides "a disclosure document" which "describing an embodiment of the Invention". The disclosure includes demonstration of error message displayed in a row below a user input field. However, the disclosure does not provide test results demonstrate that the test was in fact successful as the disclosure described. Therefore, the evidence is not persuasive and the rejection is being maintained. (emphasis added)

Appellants disagree with the Examiner. The "result" of a successful test is found on page 2 of Exhibit A from the First Declaration. This "result" is reproduced below:



Referring to item (1), at least one validation error was detected in a form-based submit based upon a value provided through an input-element in a markup specified form. In this example, the input-element in the markup specified form is represented by the box surrounding "5," the value is "5," and the validation error is that the value is not between 10 and 99.

Referring to item (2), a row is inserted in the markup specified form in a position which is proximate to the input-element, and the row has a background color which differs from other colors which are visible in proximity to the inserted row. In this example, the row is immediately below the input-element (i.e., the box surrounding "5") and has a different background color.

Referring to item (3), error text corresponding to the validation error is selected and inserted in the row. In this example, the text (i.e., "is too small. It has to be at least 10") has

been selected and corresponds to the validation error. This text has also been inserted into the row.

Referring to items (4) and (5), an anchor tag has been inserted in the markup specified form in a position which is proximate to the input-element, and the markup specified form is served in a response to the form-based submit with the response referencing the anchor tag. The serving and display of the markup specified form is what is shown and is a result of a successful test of Appellants' claimed invention. Appellants, therefore, respectfully submit that sufficient evidence has been submitted in the First Declaration to establish that actual reduction to practice of the claimed invention occurred prior to the filing date of Upton.

#### Constructive Reduction to Practice

The following arguments were originally presented in the Response filed July 5, 2005. In the Final Office Action dated May 6, 2005 (hereinafter the Second Office Action), the Examiner questioned the diligence from prior to October 18, 2001 (the filing date of Upton et al.) until Applicants constructive reduction to practice date of January 3, 2002 (the filing date of the present application). M.P.E.P. § 715.07 discusses "Three Ways to Show Prior Invention." The Examiner's comments are with regard to showing (C), which is constructive reduction to practice.

Notwithstanding Appellants' assertion that showing (A) has been established, Applicants also submit that the requirements of showing (C) have also been met. As discussed in M.P.E.P. § 715.07(a) and noted by the Examiner on page 8 of the Second Office Action, due diligence is

required from just prior to the reference date to the filing date of the application. The reference date of Upton is October 18, 2001, and on October 29, 2001, Applicants reviewed a final draft of the application, and on November 8, 2001, Applicants executed the "Declaration and Power of Attorney for Patent Application" for the present application. Given the closeness of these dates, Applicants submit that due diligence was exercised between just prior to the reference date of Upton and the execution of the "Declaration and Power of Attorney for Patent Application."

As noted in M.P.E.P. § 2138.06, "[r]easonable diligence is all that is required of the attorney" and "[i]f the attorney has a reasonable backlog of unrelated cases which he takes up in chronological order and carries out expeditiously, that is sufficient." As is readily apparent from the dates, there are three major holidays (i.e., Thanksgiving, Christmas, and New Years) between November 8, 2001 (the date that the Declaration and Power of Attorney for Patent Application was executed by Applicants) and January 3, 2002 (the filing date of the present application). International Business Machines Corporation, the assignee of the present application, is consistently the largest filer of patent applications with the USPTO.<sup>1</sup> Given the unmatched number of applications filed each year by IBM and the number of major holidays that occurred between the aforementioned dates, Appellants respectfully submit that the period of time between the execution date of the Declaration and Power of Attorney for Patent Application and the filing date of the present application is not unreasonable, and thus, IBM's attorneys exercised reasonable diligence in filing the present patent application. Therefore, Appellants submit that the requirements of showing (C) have also been met.

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<sup>1</sup> See, USPTO TODAY, Volume 3, No. 1, January 2002 (In a preliminary list, IBM ranked #1 with 3,411 patent issued in 2001); In a preliminary list, IBM ranked #1 with 3,288 patents issued in 2002 <http://www.uspto.gov/web/offices/com/speeches/03-01.htm>.



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3 In the Declaration dated March 11, 2005 (hereinafter the Second Declaration), Appellants  
4 presented facts that established that Appellants' attorneys engaged in reasonable diligence in  
5 filing the present application.<sup>2</sup> As declared, during the time period between November 8, 2001  
6 (the date on which the Declaration and Power of Attorney was executed by Appellants) and  
7 January 3, 2002 (the filing date of the present application), the application was taken up in the  
8 ordinary course of ongoing work in roughly chronological order from when the application was  
9 received, and during that time, (20) twenty patent application were handled.

10  
11 On page 8 of the Fourth Office Action, the Examiner responded to the Second  
12 Declaration as follows:

13 It is noted that diligence must be proven from prior to Oct 18, 2001 (the filing date of  
14 Upton et al.) until applicants' reduction to practice (constructive) Jan 03, 2002. Based upon the  
15 evidence presented in declarations filed on 12/05/05, there are apparent periods lacking activity  
16 and explanation from 10/18/01 to 10/29/01 and 11/08/01 to 01/03/02. Although, applicants points  
17 out that there are three holidays and provide a listing of 20 patent applications between 11/08/01  
18 to 01/03/02 period, however, applicants does not explain activities or procedures involving to such  
19 applications on this period except such holidays. The declaration fails to provide activities and  
20 particular facts associated with time that applicants are relying on to show completion without  
21 unexplained time gaps. Since the evidence is not persuasive, the rejection is being maintained.  
22

23 Appellants respectfully submit that the Examiner is placing a moving target in front of  
24 Appellants. The Second Declaration was prepared based upon an interview that Appellants'  
25 representative had with the Examiner on September 20, 2005, and also based upon an telephone  
26 discussion that Appellants' representative had with a USPTO specialist regarding Declarations

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<sup>2</sup> See M.P.E.P. § 2138.06. Bey v. Kollonitsch, 866 F.2d 1024, 231 USPQ 967 (Fed. Cir. 1986) (Reasonable diligence is all that is required of the attorney. Reasonable diligence is established if attorney worked reasonably hard on the application during the continuous critical period. If the attorney has a reasonable backlog of unrelated cases which he takes up in chronological order and carries out expeditiously, that is sufficient. Work on a related case(s) that contributed substantially to the ultimate preparation of an application can be credited as diligence.).

under 37 C.F.R. § 1.131. Appellants were under the impression that the Second Declaration would cure the alleged deficiencies of the First Declaration with regard to reasonable diligence.

Instead of explaining why the facts presented by Appellants did not establish that Appellants' attorneys engaged in reasonable diligence in filing the present application, the Examiner simply asked for additional information that was not asked for (but could have been asked for) during the personal interview on September 20, 2005, that Appellants' representative had with the Examiner with regard to this very issue.

Appellants are also unclear as to what probative value the "activities or procedures involving to such applications" will have on the issue as to whether or not Appellants' attorneys engaged in reasonable diligence. The fact of the matter is that the total time spent by all persons (e.g., inventors; attorneys and their staff; and examiners/Board and their staff) in taking an inventive concept from when a patent disclosure was generated to when the application issues as a patent is likely less than 1 month or perhaps even less than 1 week (i.e., 168 hours). However, in the case of the present application over 6 1/2 years have passed and yet the application is still being prosecuted. Had the Appellants and the USPTO exhibited perfect diligence with regard to this particular application, a final disposition on this application would have occurred 6 1/2 years ago. However, "perfect diligence" is not required. Instead, only reasonable diligence is required. Appellants' position is that the Examiner has failed to set forth any reasoned arguments to rebut the facts presented by Appellants as to Appellants' reasonable diligence in prosecuting the present application.

Based upon the aforementioned arguments, Appellants have established both actual and constructive reduction to practice prior to the filing date of Upton. Since all of the Examiner's rejections rely upon Upton, Appellants' position is that none of these rejections can be sustained.

Examiner's Response

The above-reproduced arguments (incorporated herein) were previously presented on pages 5-8 of the Amendment dated April 28, 2008. Referring to page 7 of the Sixth Office Action dated July 25, 2008 (hereinafter the Sixth Office Action), the Examiner responded as follows:

Applicant's arguments, see remarks, pages 3-6, filed on 4/28/08, with respect to the rejection(s) of claim(s) 1-5 have been fully considered and are persuasive. The Declaration filed on 12/21/04 is sufficient overcome the Upton reference and the effective date is back to 12/26/2000 that is the last modified exhibit [sic] A filed with the Declaration on 12/21/04. However, upon further consideration, a new ground(s) of rejection is made in view of Radtke, Jeffries, Hartman and Homer as explained in the rejection above.

Thus, the Examiner has admitted that Appellants have submitted sufficient evidence to establish actual reduction to practice prior to the filing date of Upton. Therefore, since Upton cannot be properly relied upon in rejecting claim 1, the Examiner has committed legal error in maintaining the rejection of claims 1-2 and 5 based upon Upton in view of Jeffries and Homer.

Also referring to page 7 of the Sixth Office Action, with regard to Appellants' arguments as to constructive reduction to practice, the Examiner responded as follows

This is not persuasive. Based on applicants' submitted evidence, there is time gaps of lacking activity and explanation, that is from the filing date of Upton reference 10/18/01 to Final Draft 10/29/01 and from the Final Draft 10/29/01 to Declaration signed instant application 11/8/01. It is also appears that applicants do not explain how the provided exhibit A (Attorney Docket) indicating "the application was taken up in the ordinary course of ongoing work in roughly chronological order from when the application was received". Therefore, the declaration filed on 12/05/05 fails to provide activities and particular facts associated with time that applicants are relying on to show completion without unexplained time gaps.

The Examiner's "response" is non-responsive since it merely repeats what the Examiner already asserted on page 8 of the Fourth Office Action dated February 24, 2006 (hereinafter the Fourth Office Action).

Appellants are unclear as to the level of detail requested by the Examiner. Does the Examiner want a week-by-week discussion, a day-by-day discussion, an hour-by-hour discussion, or even a minute-by-minute discussion of the "time gaps" alleged by the Examiner? As previously noted, Appellants' representative had a discussion with a USPTO specialist regarding Declarations under 37 C.F.R. § 1.131 and Appellants' representative was left with the impression that the Second Declaration would cure the alleged deficiencies of the First Declaration with regard to reasonable diligence.

The Examiner's "response" leaves Appellants unclear as to how to proceed. The Examiner's does not explain what level of detail is needed to explain the alleged time gaps – instead, the Examiner just alleges that the declaration is not sufficient without explaining what would be sufficient. Therefore, Appellants' position remains that the Examiner has failed to set forth any reasoned arguments to rebut the facts presented by Appellants as to Appellants' reasonable diligence in prosecuting the present application. Therefore, not only has Appellants establish actual reduction to practice prior to the critical date, Appellants have also established construction reduction to practice.

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Res Judicata

Sixth and Seventh Office Action

As previously noted, the Examiner has already admitted that Appellants have submitted sufficient evidence to establish actual reduction to practice prior to the filing date of Upton. As a result, in the Sixth Office Action, the Examiner withdrew the rejection of claims 1-2 and 5 based upon Upton in view of Jeffries and Homer. However, in the Sixth Office Action, The Examiner, however, rejected claims 1-4 based upon the new combination of Radtke, Hartmann, Jeffries, and Homer. In the Seventh Office Action, the Examiner maintained this rejection.

Eighth Office Action

In response to an Appeal Brief filed by Appellants on January 14, 2009 (hereinafter the Second Appeal), the Examiner withdrew the rejection based upon the combination of Radtke, Hartmann, Jeffries, and Homer and reinstated the old rejection of Upton in view of Jeffries and Homer. The basis for the Examiner's rejection is *res judicata* and in the second enumerated paragraph spanning pages 2 and 3 of the Eighth Office Action, the Examiner reproduced, nearly word-for-word, the entirety of M.P.E.P. § 706.03(w), entitled "Res Judicata."

Referring to page 3 of the Eight Office Action, the Examiner then made the following assertions:

- a. Board affirmed the rejections of claims 1-10 on 08/29/2007.
- b. The RCE and amended claims are filed on 10/29/07. The claims have been substantially amended to require a new ground of rejections using an additional prior art reference.
- b. The amendment is filed 4/28/08 comprising amended claims 1-5 having limitations exactly the same limitations of claims 1-5 respectively that have been affirmed by the Board decision. Therefore, amended claims 1-5 filed on 4/28/2008 are rejected under the ground of *Res Judicata* as and made final.

d. Examiner herein vacates the office actions mailed on 7/25/2008 and 10/14/2008. It is noted that the Declaration (filed on 12/21/04 and 12/05/05) are filed before the Appeal Brief (filed on 7/13/06). Thus, this Declaration is also binding with the Board decision and the examiner does not further consider the Declaration. (emphasis in original)

Of particular interest is the Examiner's assertion that "this Declaration is also binding with the Board decision and the examiner does not further consider the Declaration." This statement does not have any known legal relevance or known legal support, and therefore, Appellants proceed on the basis that the Examiner was attempting to assert something else. Regardless, the Examiner's assertion that "this Declaration is also binding with the Board decision" is incorrect.

Not only did the Honorable Board not consider the First or Second Declarations or Appellants' arguments with regard to these Declarations, these Declarations were never presented in the First Appeal Brief, which resulted in the Decision dated August 29, 2007. Referring to the Evidence Appendix on page 14 of the First Appeal Brief dated July 13, 2006 (hereinafter the First Appeal Brief), it was stated:

No evidence submitted pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the Examiner has been relied upon by Appellants in this Appeal, and thus no evidence is attached hereto.

Thus, neither of the First and Second Declarations were considered by the Honorable Board and rendering its Decision. Therefore, these Declarations are not "binding with the Board decision" since the Decision did not consider or rely upon these Declarations.

Although apparently not recognized by the Examiner, 10 out of the 14 cases cited within this section of the M.P.E.P. § 706.03(w) (and reproduced by the Examiner on pages 2 and 3 of the Eighth Office Action) involved situations in which "*res judicata* rejections were reversed" (underline added).

Referring to the cases, cited by the Examiner, in which *res judicata* rejections were reversed, several of them were based upon the presence of different questions of patentability. For example, referring to In re Russell, 439 F.2d 1228, 169 USPQ 426 (CCPA 1971), it was stated

Here appellant has made a new record, presenting different questions of patentability even if the claims are viewed as identical to those in the prior case, as they were in *Herr*. As we pointed out in In re Craig, 411 F.2d 1333, 56 CCPA 1438 (1969), there is a public interest in granting valid patents which must be considered against the public interest upon which *res judicata* is based. For this reason, we reverse the board's decision on the *res judicata* rejection.

Thus, similar to the present application, in which Appellant has presented a new record and presented different questions of patentability (e.g., by identifying the result of a successful test, which is found on page 2 of the Exhibit A from the First Declaration – thereby supporting Appellants' contention of actual reduction to practice).

Referring to In re Herr, 377 F.2d 610, 153 USPQ 548 (CCPA 1967), an Examiner rejected claims based upon *res judicata* after Appellant presented new evidence of nonobviousness that overcame the original rejection under 35 U.S.C. § 103. The Court then determined that:

Granted the instant parties and claims are *identical* with those of the parent *Herr* application and, in a *broad* sense, the issue in the original appeal was, as here, whether those claims were allowable in view of the prior art. More to the point, however, the precise issue in the prior *Herr* appeal was whether appellant was entitled to allowance of his claims in the *application* and *record* then on appeal. The precise issue here is whether appellant has legally established his right to those claims in the *application* and *record* now before us. We think he has.

In the present application, similar to In re Herr, a determination has already been made the evidence submitted by Appellants overcomes the presently-applied rejection. Therefore, Appellants have legally established that a rejection of claim 1 based upon Upton in view of Jeffries and Homer cannot legally stand since Upton cannot properly be applied as prior art.

Therefore, for the Honorable Board to affirm the Examiner's rejection based upon *res judicata* would, in the words of the In re Herr Court, "unjustly enrich the public at the expense of the inventor."

Therefore, for the reasons submitted above, Appellant respectfully submits that the Examiner's reliance upon *res judicata* is inappropriate. Moreover, since the Examiner has already admitted that the First and Second Declarations have overcome the Upton reference, the Examiner's rejection of claims 1-2 and 4 based upon Upton in view of Jeffries and Homer cannot stand.

**THE REJECTION OF CLAIMS 3-4 UNDER 35 U.S.C. § 103 FOR OBVIOUSNESS BASED UPON UPTON IN VIEW OF JEFFRIES, HOMER, AND HARTMANN**

For convenience of the Honorable Board in addressing the rejections, claims 3-4 stand or fall together with independent claim 1.

Claims 3-4 depend from independent claim 1, and Appellants incorporate herein the arguments previously advanced in traversing the imposed rejection of claim 1 under 35 U.S.C. § 103 for obviousness based upon Upton in view of Jeffries and Homer. Specifically, Upton cannot be properly applied as prior art. The additional reference to Hartmann does not cure the deficiencies of the combination of Upton, Jeffries, and Homer. Accordingly, the proposed combination of references would not yield the claimed invention. Appellants, therefore, respectfully submit that the imposed rejection of claims 3-4 under 35 U.S.C. § 103 for obviousness based upon Upton in view of Jeffries, Homer, and Hartmann is not viable.



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Conclusion

Based upon the foregoing, Appellants respectfully submit that the Examiner's rejections under 35 U.S.C. § 103 for obviousness based upon the applied prior art is not viable. Appellants, therefore, respectfully solicit the Honorable Board to reverse the Examiner's rejections under 35 U.S.C. § 103.

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To the extent necessary, a petition for an extension of time under 37 C.F.R. § 1.136 is hereby made. Please charge any shortage in fees due under 37 C.F.R. §§ 1.17, 41.20, and in connection with the filing of this paper, including extension of time fees, to Deposit Account 09-0461, and please credit any excess fees to such deposit account.

Date: July 24, 2009

Respectfully submitted,

/Scott D. Paul/

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CUSTOMER NUMBER 46320

## **VIII. CLAIMS APPENDIX**

1. An inline error notification method comprising:

detecting in a form-based submit, at least one validation error based upon a value provided through an input-element in a markup specified form;

inserting a row in said markup specified form in a position which is proximate to said input-element, said row having a background color which differs from other colors which are visible in proximity to said inserted row;

selecting error text corresponding to said validation error and inserting said selected error text in said row;

further inserting an anchor tag in said markup specified form in a position which is proximate to said input-element; and,

serving said markup specified form in a response to said form-based submit, said response referencing said anchor tag.

2. The inline error notification method of claim 1, further comprising the step of:

inserting an error image adjacent to said input-element.

3. The inline error notification method of claim 1, further comprising the steps of:

determining whether said markup specified form contained multiple views, one of said multiple views containing said input-element; and,

if it is determined that said markup specified form contains multiple views, identifying said one of said multiple views and setting said identified one of said multiple views to a visible status.

4. The inline error notification method of claim 1, wherein said step of inserting a row in said markup specified form in a position which is proximate to said input-element comprises the step of:

inserting a row in said markup specified form in a position which is proximate to but below said input-element, said row having a background color which differs from other colors which are visible in proximity to said inserted row.

5. The inline error notification method of claim 4, wherein said step of further inserting an anchor tag in said markup specified form in a position which is proximate to said input-element comprises the step of:

further inserting an anchor tag in said markup specified form in a position which is proximate to but before said input-element.

**IX. EVIDENCE APPENDIX**

Attached hereto are two Declarations under 37 C.F.R. § 1.131, which have been entered by the Examiner and relied upon by Appellants in this Appeal. The first Declaration was filed December 21, 2004, and the second Declaration was filed December 5, 2005.

**X. RELATED PROCEEDINGS APPENDIX**

On August 29, 2007, a Decision on Appeal was rendered in the present Application, a copy of which is attached hereto. Appellants are unaware of any other related appeals and interferences.